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IN THE

Supreme Court of the United States

October Term, 1998

JEROME B. ROSENTHAL

Petitioner [Defendant]

v.

ROBERT NOLAN CONRAD, and
ROBERT NOLAN CONRAD, A LAW
CORPORATION

Respondents [Plaintiffs]

On Petition For A Writ of Certiorari
To The Court of Appeal of California
Second Appellate District

PETITION FOR WRIT OF CERTIORARI

JEROME B. ROSENTHAL, Petitioner
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2518

Questions Presented

1. Whether the Federal and / or State constitutional doctrines of the "Separation of Powers" prevent judicial action which is contrary to statute's(s') plain meaning.

2. Whether, and if so, under what circumstances or conditions, Court orders or judgments which contravene clear legislation are nullities, void, and attackable at any time, in any manner or forum.

3. Whether judicial encroachment on legislative power is a denial of the due process guarantee of U.S. Constitution's Fourteenth Amendment.

4. Whether an adjudication of contempt procured by fraud or other improprieties, where the alleged contemnor is deprived of property thereby, constitutes a denial of due process.

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Petitioner herein respectfully prays that a writ of certiorari issue to review:

a) the decision of the Court of Appeal of California, dated July 21, 1998

and / or

b) the judgment of the Supreme Court of California, dated October 14, 1998.

I.

OPINIONS BELOW

The opinions of:

(1) The California Court of Appeal

and

(2) The California Supreme Court

are printed in the Appendix (separate accompanying Volume, filed herewith), index on page I, supra.

II.

BASIS FOR JURISDICTION

The order of the Cal. Court of Appeal Court which petitioner seeks to have reviewed was made on July 21, 1998. This Court has jurisdiction to review that order pursuant to 28 U.S.C. Section 1257.

"Sec. 1257. **State courts; certiorari**

(a) Final judgments or decrees rendered by the

highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

III

CONSTITUTIONAL, STATUTES, REGULATORY PROVISIONS, RULES INVOLVED

United States Constitution, Amendment Five:

"No person shall . . .be deprived of life, liberty or property without due process of law."

United States Constitution, Amendment Fourteen, Section 1:

". . . [N]or shall any state deprive any

person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

United States Constitution (IMPLICIT)

"Separation of Powers." (Leading case: *Springer v. Philippine Islands*, 277 U.S. 189.

California Constitution, Article III, Section 3:

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others."

Code of Civil Procedure, Section 695.030 (a):

Sec. 695.030. Non-assignable and non-transferable property; interest in trust; cause of action for money or property.

(a) Except as otherwise provided by statute, property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment.

Code of Civil Procedure, Section 695.040:

Sec. 695.040. Exempt property; release

Property that is not subject to enforcement of a money judgment may not be levied upon or in any other manner applied to the satisfaction of a money judgment. If property that is not subject to enforcement of a money judgment has been levied upon, the property may be released pursuant to the claim of exemption procedure provided in Article 2 (commencing with Section 703.510) of Chapter 4.

Code of Civil Procedure, Section 703.010 (a):

Sec. 703.010. Application of exemptions

Except as otherwise provided by statute:

(a) the exemption provided by this chapter or by any other statute apply to all procedures for enforcement of a money judgment.

Code of Civil Procedure, Section 703.020 (b) (1)

Sec. 703.020 Persons who may claim exemptions

(b) the exemptions provided in this chapter may be claimed by any of the following persons:

(1) In all cases, by the judgment debtor or a person acting on behalf of the judgment debtor.

Code of Civil Procedure, Section 703.030 (a) (b):

Sec. 703.030. Claiming exemptions; time and manner; waiver; relief for failure to claim

(a) An exemption for property that is described in this chapter or in any other statute as exempt may be claimed within the time and in the manner prescribed in the applicable enforcement procedure. If the exemption is not so claimed, the exemption is waived and the property is subject to enforcement of a money judgment.

(b) Except as otherwise specifically provided by statute, property that is described in this chapter or in any other statute as exempt without making a claim is not subject to any procedure for enforcement of a money judgment.

Code of Civil Procedure, Section 704.100 (a):

Sect. 704.100. Life insurance policies

(a) Unmatured life insurance policies (including endowment and annuity policies), but not the loan value of such policies, are exempt without making a claim. (Emphasis added).

Code of Civil Procedure, Section 704.210:

Sec. 704.210. Property not subject to enforcement of money judgment; exemption

Property that is not subject to enforcement of a money judgment is exempt without making a claim.

Code of Civil Procedure, Section 703.510:

Sec. 703.510. Claiming exemptions after levy; property exempt without claim; release

(a) Except as otherwise provided by statute, property that has been levied upon may be claimed to be exempt as provided in this article.

(b) If property that is exempt without making a claim is levied upon, it may be released

pursuant to the exemption procedure provided in this article. (*Added by Stats. 1982, c. 1364, p. 5151, Sec. 2, operative July 1, 1983).*

California Rules of Court, Rule 24 (a):

"**(a) [When decisions become final]** All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties.

A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day periods not to exceed a total of 60 additional days. An order of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed." [Emphasis added].

IV.

STATEMENT OF THE CASE

Respondents, (ROBERT NOLAN CONRAD, and ROBERT NOLAN CONRAD, A LAW CORPORATION), in executing their judgment against Petitioner, levied

(inter alia) on payments due Petitioner under annuity policy (contract) issued by Travelers Life Insurance Company, Policy #0600SA55449.

The Petitioner filed and served a CLAIM OF EXEMPTION based upon statutes providing that the particular property (right to receive the pertinent annuity payments) is not subject to the enforcement of a money judgment, is exempt without making any claim, and for automatic, incontestable, release thereof from any taking. In essence, Petitioner (in CLAIM and in REPLY) contended that the many statutes, i.e., *Code of Civil Procedure* Sections 695.030 (a); 695.040; 703.010 (a); 703.020 (b) (1); 703.030 (a) (b); 704.100 (a) and 704.210, in sum express compleat intent of the legislature that the subject annuity policy, or payment thereunder, is not subject to the enforcement of a money judgment, and is exempt, without making a claim, (and automatically and incontestably release) from any taking. That indisputable group of statutes, coupled with the doctrine of SEPARATION OF POWERS, clearly expresses the determinative conclusion that no court, trial or review, had any jurisdiction whatsoever to "take" the annuitant's (Petitioner's) payments under the annuity policy. Reference to the "SEPARATION OF POWERS"

doctrine including the provisions of the *California Constitution* and the *United States Constitution*, Implicit, were urged by Petitioner.

Although the phrase "due process" was not actually employed by Petitioner, the contentions of Petitioner (in trial and review courts) are tantamount to and descriptive of the constitutional prohibition against deprivation without "due process."

Respondents' OPPOSITION to Petitioner's CLAIM OF EXEMPTION contended:

1. that Petitioner was not entitled to seek the aid of the Court of Appeal, and not entitled to the property (payments due under the annuity policy). Respondents, in this respect, said that Petitioner was "in contempt" and the "contempt was not purged."

   But the alleged "contempt" was simply non-existent and consequently could not be purged by Petitioner. (Both the Respondents' OPPOSITION, and Petitioner's REPLY thereto, are matters of record and not subject to dispute.)

2. that Respondents were seeking to levy <u>not</u> on the annuity policy, *per se*, but rather on the "proceeds" of the policy.

But the policy itself specifies the obligation (of the annuity-issuing company) to make "payments." The terms "proceeds" and "payments" are synonymous, in all dictionary authority.

The Court of Appeal makes two statements which "decide the case." The decision, (see APPENDIX, p. 2-c-) states:

a) that the policy provides that the "proceeds are assignable" by annuitant. ***But the policy itself expressly provides exactly to the contrary, i.e., "The annuitant does not have any right to sell or assign <u>any annuity payments</u> . . . ."***

b) The second statement is that the "respondent has not sought to levy on the annuity policy, only its proceeds. As is stated above, "proceeds" are exactly synonymous, in such instances, with "payments,"

The Court of Appeal decision also states: "As to maturity, the answer is the same, citing <u>*In re Moffat*</u>

(Bankr. C.D. Cal. 1989) 107 B.R. 255, 261; *In re Moffat* (9th Cir. 1992) 959 F.2d 740.)

As will be more fully delineated in the "REASONS FOR GRANTING THE WRIT," the *Moffat* opinions are literally by their own express terms, not applicable to Petitioner's current annuity.

The Court of Appeal's opinion is a most noteworthy proof of the evils of deviating from and ignoring the controlling "SEPARATION OF POWERS," state and federal. The inescapable dictate of that "SEPARATION" doctrine is that no court (trial or review) has any jurisdiction to reverse or modify the constitutional mandate.

3. that the annuity-issuing company's obligation was "matured." Significance: *California Code of Civil Procedure* Section 704.100 provides that "unmatured" policies "are exempt without making a claim." That position of Respondents was advanced so as to avoid the applicability of that statute, and thus deprive Petitioner of the right to receive the annuity payments "without making a claim." **But if Petitioner was entitled to recover all payments "without making a**

claim," the entire "case" would (and should) be resolved in favor of Petitioner.

Respondents' contention (that the obligation is "matured") is in direct violation of the long-established principle (not disputed) that "matured obligation" means "unconditional obligation." *Black's Law Dictionary,* 6th Ed., p. 979, ergo "unmatured" means "conditional."

Of record, the "obligation" of the "issuing company" is totally conditional upon Petitioner's being "alive" on the date of each payment.

The California Court of Appeals affirmed (Order dated July 21, 1998) the trial Court's denial of exemption.

Petitioner filed PETITION FOR REVIEW in the Supreme Court of California dated August 31,1998.

The California Supreme Court summarily denied Petitioner's PETITION FOR REVIEW, denial dated October 14, 1998.

V.

REASONS FOR GRANTING THE WRIT

Courts are without power to legislate by judicial decision. Meyer v. Board of Public Works (1942) 51 CA 2d 456.

No matter how unfortunate the result may seem through a Court's refusal to qualify the broad terms of a general statute, the Court must not assume the task of legislation. U.S. v. Security-First (D.C. 1940) 30 FSP 115.

Griffin v. Colisa County (1941) 44 Cal. App. 2d 915; Franchise Motors v. Seavey (1925) 196 CA 17; Martin v. Superior Court (1924) 194 C 93.

It is not consistent with our scheme of government for a Court to inquire into the motive of legislators in enacting legislation. Tenney v. Brandhove (1951) 341 U.S. 367, 342, U.S. 843; Allen v. Markham (1947) 156 F 2d 653, 331 U.S. 503; Serve Yourself v. Brock (1952) 39 C 2d 813, 345 U.S. 980; Plum v. State Board (1942) 51 CA 2d 382; Warner v. S. California (1950) 35 C 2d 121.

Obviously, the judgment or order though final on the merits has no binding force or effect and is subject to collateral attack since totally VOID for lack of jurisdiction. 7 Witkin Procedure 3d, Judgment, Section

194; and *Restatement of The Law*, 2d Section 12, 17.

A VOID order may be attacked at any time or anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity and can be neither a basis nor evidence of any right whatever. Texas Co. v. Bank of America (1935) 5 Cal. 2d 35, 41. In re Marriage of Lackey (1983) Cal. App. 3d 698, 701.

The California Constitution expressly states the doctrine, sometimes known as "SEPARATION OF POWERS." Parker v. Riley, 18 Cal. 2d, 83, 89; Bixby v. Piero, 4 Cal. 3d 130, 141. The Federal Constitution does not expressly state the doctrine, but the principle has been declared to be implicit in it. Springer v. Philippine Islands 277 U.S. 189 48 S.Ct. 480, 482. It is the province of the judiciary to declare the law as it is, and not as the Court deems it. Kelley v. Aarons 238 F 996, affirmed 245 U.S. 116. The express terms of a statute may not be changed by construction. First Congregational Church of Glendale v. Los Angeles County 9 Cal. 2d 591. Where, as here, the intention of the legislature was without doubt, the Court could not make it otherwise by supposing any condition not

expressed in the act under consideration. Field v. Seavey 60 U.S. 323. Ex parte Slayback 209 Cal. 480, followed in ex parte Merwin 209 Cal. 786.

Petitioner vociferously urged in the trial and review courts below the absolute necessity for observing and applying the federal (as well as state) "SEPARATION OF POWERS" and the "due process" guarantee, (although not in *haec verba*). Those two fundamental principles must not be ignored or avoided in the name of the democratic form of government.

The implications are dangerous and fundamental. The doctrine of "SEPARATION OF POWERS" clearly prevents any valid court action contravening the legislative enactments, but in this case the doctrine is ignored. Respondents do not in their Respondents' Brief dated February 12, 1998, mention, resist or deny the clear assertions of the doctrine in Petitioner's APPELLANT'S OPENING BRIEF in the California Court of Appeals dated December 21, 1997.

The California courts refused to apply and honor the "SEPARATION OF POWERS" doctrine; in fact, they ignored the doctrine despite Petitioner's demand and

request that the doctrine be applied. It is therefore obviously necessary that this Honorable Court honor and apply the federal constitutional mandate known as the "SEPARATION OF POWERS."

This Honorable Court's recognition and enforcement of that doctrine constitutes the last bulwark and bastion defending the rule.

The profoundly serious conclusion of the entire matter in its present state (without corrective intervention by this Court) is the promotion of lawlessness and defiance of fundamental guarantees under the State and Federal Constitutions.

Without the corrective aid of this Court (by the issuance of the Writ) the parties who have fraudulently and perjuriously procured the very Court actions here in question are literally rewarded by the same system and principles of justice they misuse and defy.

By way of example, Respondents actually by fraud and deceit (perjuriously) procured trial Court order finding and holding Petitioner in contempt of AN ORDER

THAT NEVER EXISTED. To compound the outrage, Respondents succeeded in objecting (without any applicable authority) that because the contempt was not purged, Petitioner was not entitled to statutory exemptions.

By straying from the safe pathway of the "SEPARATION OF POWERS," the Court of Appeal decided that Respondents' levy on the "proceeds" (and not on the policy itself), and held that the exemption should be denied. But the distinction on which the Court of Appeal decided that levying on the "proceeds" was permissible (even though the policy expressly and repeatedly provided the exact opposite) is non-existing. In five places the policy actually referred in all pertinent respects to annuity "payments," the synonym for "proceeds." The policy-issuing company made its intentions extra clear by making the reference to "payment(s)" in five distinct places in the policy.

Had the Court of Appeal refrained from encroaching on the legislative branch, the extremely erroneous and totally unsupported conclusion (contented by respondents) would have been avoided.

The California Court of Appeal based its decision and opinion affirming the Superior Court's order denying the exemption, in part by reliance on and citing *"In re Moffat"* (1989 and 1992) decisions. (See APPENDIX, [1989, Pp. 3-20]; [1990, Pp. 20-28]; [1992, Pp. 28-30]). That Court's reliance on *Moffat* is another very serious illustration of the evils and injustices that result from the failure to apply the "SEPARATION OF POWERS" doctrine. The three *Moffat* opinions expressly and explicitly stated that the *Moffat* conclusions applied to no other annuities, (certainly not Petitioner's), by carefully noting that it was speaking only of the "subject annuity" or the "annuity in question." [Emphasis added].

In endorsing and adopting the *Moffat* opinions, the Court of Appeal was figuratively sailing the judicial ship in hazardous waters. The dangers consisted of the contentions that:

a) Petitioner's annuity is "matured."

Wrong: Petitioner's policy was "not matured" because indisputably "conditional" on his being alive. *Black's Law Dictionary*, 6th Ed. , P. 979.

b) The *Moffat* court noted the two distinct interests in an annuity, i.e., the "ownership interest" and the "beneficiary interest."

The statement deceives by omission, the Moffat court opinion states that the reason for the distinction is entirely prescribed by the Bankruptcy Code and not by California law, since "California opted to use its own statutory exemptions instead of the Federal ones." (1989) *Moffat* 107 B.R. 255, 253, and 263 Fn 14.

c) The cost of the *Moffat* annuity was $190,000 but the *Moffat* folks (Dr. & wife) will receive exactly $174,000, i.e., a loss certain to occur.

It is an undisputed fact, of record, that although the Rosenthal annuity cost was $299,719, the annuity payments paid to 1988 have totaled in excess of $800,000. [Payments at $50,000 per yr., since October 1981].

d) Dr. Moffat testified that he and Mrs. Moffat bought the annuity to keep his creditors from

reaching assets. *In re Moffat* 107 B.R. 257.

It is another undisputed fact, of record, that at the time of issuance of the Petitioner Rosenthal annuity (1981), Petitioner had no creditors.

The above illustrates observations re the serious errors of the Court of Appeal's reliance on and citing *Moffat* and further illustrates the folly and injustice of failing to support and apply the constitutional mandate of "SEPARATION OF POWERS," and the violation of "due process" rights.

Additionally serious distortions or injustices arising from the failure to apply "SEPARATION OF POWERS" and "due process," constitutes the failure to enforce the clear legislative intent and enactments that the annuity payments are not subject to the enforcement of a money judgment, are exempt without making a claim, and are automatically and indisputably to be released from any "taking."

It is difficult to conceive another situation in which the legislative intent and purpose is so clearly and

forcefully expressed. Indeed, in the many statutes, Code of Civil Procedure, Sections, i.e., 695.030 (a), 695.040, 703.010 (a), 703.020 (b) (1), 703.030 (a) (b), 703.510, 704.100 (a), and 704.210 which are set forth above in **Part III, CONSTITUTIONAL, STATUTES ...INVOLVED."**

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: MARCH 14, 1999.

JEROME B. ROSENTHAL
PETITIONER, PRO SE